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BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF LIGE & WILLIAM  
DICKSON and DEPARTMENT OF  
TRANSPORTATION,

Appellants,

v.

PUGET SOUND AIR POLLUTION CONTROL  
AGENCY,

Respondent.

PCHB No. 86-215

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW & ORDER

THIS MATTER, the appeal of a notice and order of civil penalty for \$1,000 for alleged violation of regulations governing the removal of asbestos, came on for hearing before the Board on January 9, 1987, at Lacey, Washington. Seated for and as the Board were: Lawrence J. Faulk, Chairman, Wick Dufford, (Presiding), and Judith A. Bendor, Member. Pursuant to Chapter 43.21B.230 RCW, respondent PSAPCA elected a formal hearing and the matter was officially reported by Gene Barker and Associates.

Respondent public agency appeared and was represented by Keith D. McGoffin. Lige & William B. Dickson Company was represented by John L. Dickson, appellant's foreman on this particular project.

1 Witnesses were sworn and testified. Exhibits were admitted and  
2 examined. Argument was heard. From the testimony, evidence, and  
3 contentions of the parties, the Board makes these

4 FINDINGS OF FACT

5 I

6 The Puget Sound Air Pollution Control Agency (PSAPCA) is an  
7 activated air pollution control authority under terms of the state's  
8 Clean Air Act, empowered to monitor and enforce federal and state  
9 emissions standards for hazardous air pollutants, including work  
10 practices for asbestos removal.

11 PSAPCA has filed with the Board certified copies of its  
12 Regulations 1 and 2, of which we take official notice.

13 II

14 Lige & William B. Dickson Company is a general contractor located  
15 in Tacoma, Washington which has been in business since 1937. Their  
16 business includes road and highway projects.

17 In the late summer and fall of 1986, the Dickson Company was  
18 engaged as a subcontractor in connection with construction of the  
19 highway section known as the Tacoma Spur. Their work included the  
20 removal of several transite duct pipes buried under the intersection  
21 of 14th and A Streets in Tacoma, to make way for the new roadway. The  
22 transite duct pipes, which had been installed about 30 years earlier,  
23 were composed in part of asbestos. Their function was to carry  
24  
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1 electrical cables. A half dozen or more of these pipes, estimated at  
2 3 or 4 inches in diameter, were encased in a slab of concrete 40 to 50  
3 feet long, and about 2 1/2 feet wide and 3 feet high.

### 4 III

5 On September 22, 1986, Mr. John L. Dickson, Foreman for the  
6 Dickson Company, completed and filed with PSAPCA a Notice of Intent to  
7 Remove or Encapsulate Asbestos at the project site. The notice stated  
8 that removal was to commence October 2, 1986. The method of removal  
9 was described as "wetting concrete while breaking it with jackhammer,  
10 then bagging transite pipe pieces in approved asbestos disposal bags."

### 11 IV

12 The Company vigorously asserts that the method of removal -  
13 jackhammering and bagging - was included in the Notice of Intent  
14 because PSAPCA insisted on it. PSAPCA firmly denies that it specified  
15 any particular method of removal.

16 In any event the Company did in fact use this method of removal, a  
17 method which could have been performed without violation of PSAPCA's  
18 rules.

### 19 V

20 On October 2, a PSAPCA inspector visited the site and observed  
21 that work had begun on the concrete slab. Workers were chipping off  
22 concrete with a jackhammer. They advised the inspector that they were  
23

1 just removing dirt and outer concrete to obtain access to the transite  
2 pipes. No loose fragments of transite pipe were observed.

3 VI

4 On October 8, 1986, at approximately 11:00 a.m., the PSAPCA  
5 inspector reinspected the project site. The inspector observed an  
6 open ditch where the concrete slab and transite duct pipes had been.  
7 The inspector examined the ditch and pile of dirt next to it.  
8 Fragments of transite pipe were found up to two inches in diameter  
9 scattered throughout the ditch and on the pile. The transite  
10 fragments were dry and uncontained and looked like the transite  
11 encased in concrete during the inspector's October 2, 1986, site  
12 inspection. The inspector collected a sample of the transite fragment  
13 from the ditch and took three photographs.

14 There was no construction occurring at the project site on October  
15 8, 1986. The asbestos removal work had, by then, been completed by  
16 the Dickson Company.

17 VII

18 After the October 8, 1986 inspection, PSAPCA issued Notices of  
19 Violation Nos. 021223, 021224, 021527, and 021528 to appellant Dickson  
20 Company for alleged violation of provisions of 10.04 and 10.05 of  
21 PSAPCA's Regulation 1.

22 VIII

23 The samples collected by the inspector on October 8, 1986, were  
24 analyzed by the Department of Ecology laboratory, and the results  
25

1 showed that the collected sample contained 30% chrysotile and 35%  
2 crocidolite - both forms of asbestos.

3 On November 7, 1986, PSAPCA mailed Notice and Order of Civil  
4 Penalty No. 6580 for \$1,000 to Lige & William B. Dickson Company,  
5 alleging a violation of the asbestos work practices earlier specified  
6 in the Notices of Violation. Feeling aggrieved by the penalty,  
7 appellant filed an appeal with this Board which we received December  
8 5, 1986.

9 IX

10 Appellant Company argues that it had cleaned up the site by the  
11 time of the October 8 inspection, and that the transite fragments  
12 found might have come from some other source.

13 No other asbestos removal projects were underway in the immediate  
14 vicinity at the time in question. Any transite fragments from another  
15 job would have had to be brought to the trench and distributed there.

16 Under all the circumstances we find it more likely than not that  
17 the transite fragments observed by PSAPCA's inspector were the result  
18 of the Dickson Company's work.

19 X

20 The Company asserts that the fragments found may not have been  
21 friable. Friable asbestos is material that hand pressure can crumble,  
22 pulverize, or reduce to powder when dry. Such material has a high  
23 potential for releasing asbestos fibers into the air.

1 The Company showed that transite duct pipe used for water or wires  
2 is generally quite hard and won't crumble in the hand. Moreover, the  
3 Company's evidence tended to show that the pipe involved here - prior  
4 to the ministrations of the jackhammer - was not friable and presented  
5 little potential for fibers to be released to the air.

6 However, a jackhammer is impossible to operate with total  
7 precision and tends to perform radical surgery on whatever it  
8 encounters. PSAPCA's inspector testified that the dry fragments he  
9 found were in a friable state. The Company has no contrary evidence.  
10 We find it more probable than not that the material was friable.

11 XI

12 Asbestos is classified federally as a "hazardous air pollutant."  
13 Under Section 112 of the federal Clean Air Act this term describes a  
14 substance which

15 causes or contributes to air pollution which may  
16 reasonably be anticipated to result in an increase  
17 in mortality or an increase in serious irreversible,  
or incapacitating reversible, illness.

18 Because of its dangerousness, asbestos is the subject of a special set  
19 of emission limiting work practices called National Emission Standards  
20 for Hazardous Air Pollutants, (NESHAPS). The threshold for regulation  
21 is any material containing more than one (1)% asbestos. No safe level  
22 of exposure has been established.

1 In the instant case the asbestos-containing fragments were found  
2 in an open trench - an area unposted, unconfined, outdoors, and  
3 exposed to the public in the downtown of one of the state's major  
4 cities.

5 XII

6 Any Conclusion of Law hereinafter determined to a Finding of Fact  
7 is hereby adopted as such.

8 From these facts the Board comes to these

9 CONCLUSIONS OF LAW

10 I

11 The Board has jurisdiction over these persons and these matters.  
12 Chapters 70.94 and 43.21B RCW.

13 II

14 The State of Washington has adopted the federal NESHAPS standards  
15 (40 CFR Part 61) through incorporation by reference. WAC  
16 173-400-075. In Article 10 of its Regulation I, PSAPCA has adopted  
17 its own regulations on asbestos removal which are at least as  
18 stringent as the federal/state regulations. Among these, the agency  
19 alleges that the Dickson Company violated the following requirements  
20 for handling asbestos materials after they have been removed from a  
21 structure. (Section 10.04(b)(2)(iii)(A)(B) and (C):

22 (b) It shall be unlawful to cause or allow the  
23 removal or encapsulation of asbestos material unless:

24 . . .

1 (2) The following procedures are employed:

2 . . .

3 (iii) Asbestos materials that have been  
4 removed or stripped shall be:

5 (A) Adequately wetted to ensure that  
6 they remain wet until they are  
7 collected for disposal;

8 (B) Collected for disposal at the  
9 end of each working day; and

10 (C) Contained in a controlled area  
11 at all times until transported to a  
12 waste disposal site.

13 . . .

14 In addition, PSAPCA alleges a violation of Section  
15 10.05(b)1(iv):

16 (b) One of the following disposal methods shall be  
17 used during the collection, processing, packaging,  
18 transporting or deposition of any  
19 asbestos-containing waste material;

20 (1) Treat all asbestos-containing waste  
21 material with water as follows.

22 . . .

23 (iv) After wetting, seal all  
24 asbestos-containing material in leak-tight  
25 containers while wet.

### 26 III

27 For a violation of any of the above sections, the material  
involved must be "asbestos material" as that term is defined in  
Section 10.02(e):

(e) "Asbestos material" means any material  
containing at least 1% asbestos by weight, unless  
it can be demonstrated that the material does not  
release asbestos fibers when crumbled, pulverized,  
or otherwise disturbed."



1 It is uncontested that the fragments found contained at least 1%  
2 asbestos by weight. Appellants did, however, assert that the material  
3 was not friable.

4 On the basis of our finding that the required demonstration was  
5 not made (Finding of Fact X), we conclude that the materials in  
6 question met the definition of "asbestos materials."

7 IV

8 Given that "asbestos materials" were involved, we conclude that  
9 the Dickson Company violated Section 10.04(b)(2)(iii)(A)(B) and (C)  
10 during the asbestos removal operation at 14th and A Streets in Tacoma.

11 V

12 Under Section 10.04(b)(2)(iii)(B) asbestos materials must be  
13 "collected for disposal." The term "collected for disposal" means  
14 "sealed in a leak-tight labeled container while wet." Section  
15 10.05(b)(1)(iv) requires essentially the same thing. We believe the  
16 latter section is aimed mainly at the disposal portion of the  
17 removal/disposal sequence. We decline to hold that a separate  
18 violation of Section 10.05(b)(1)(iv) was shown. See, McFarland  
19 Wrecking Corporation v. PSAPCA, PCHB No. 86-159 (April 20, 1987).

20 VI

21 Pursuant to 70.94.431, a penalty of up to \$1,000 per offense may  
22 be assessed for violation of PSAPCA's regulations.  
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1 Here three separate (though closely related) violations were  
2 shown. These violations occurred in the open, in a populous area,  
3 under conditions providing no protection against public exposure.  
4 Given the extraordinarily hazardous nature of asbestos, we do not  
5 believe under all the facts and circumstances that the penalty  
6 assessed was unreasonable.

7 VII

8 Any Finding of Fact which is deemed a Conclusions of Law is hereby  
9 adopted as such.

10 From these Conclusions, the Board enters this  
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ORDER

THE Notice and Order of Civil Penalty (No. 6580) is AFFIRMED.

DONE this 14<sup>th</sup> day of March, 1988.

POLLUTION CONTROL HEARINGS BOARD

(See Dissenting Opinion)  
LAWRENCE J. FAULK, Presiding

Wick Dufford  
WICK DUFFORD, Member

Judith A. Bendor  
JUDITH A. BENDOR, Member

1 DISSENTING OPINION  
2 LAWRENCE J. FAULK

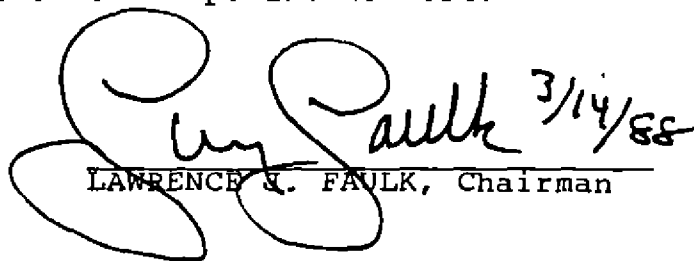
3 I dissent. The majority's opinion rests on the premise that  
4 appellant Lige & William B. Dickson Company failed to eliminate the  
5 possibility that the material was friable. I disagree. The Company  
6 showed that the kind of material involved contained tightly bound  
7 fibers lacking the potential for release into the air. I would  
8 conclude that the fragments found did not meet the required threshold  
9 for potential air emissions. It should be born in mind that the  
10 purpose of PSAPCA's asbestos regulations is to prevent the release of  
11 asbestos to the ambient air. See Section 10.01, Regulation I.

12 I find the majority's result particularly disturbing because of  
13 the failed relationship between PSAPCA and the Company which it  
14 glosses over. I am convinced that the events which occurred here were  
15 the direct outgrowth of the agency's rigidity in insisting that the  
16 concrete slab be jack-hammered. The Company wished simply to cut the  
17 slab into sections, wet and cover the ends, and dispose of the  
18 transite pipe still safely encased in concrete. This would have been  
19 quicker, easier and safer.

20 What this case demonstrates is the complete breakdown of  
21 communications between the regulatory agency and a responsible  
22 business with no prior record of violations. Law enforcement can do  
23 better than that.

24  
25 DISSENTING OPINION  
26 LAWRENCE J. FAULK  
27 PCHB NO. 86-215

1 A more cooperative approach would have benefited all concerned  
2 and, perhaps, have reduced risks to the public as well.  
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4  3/14/88  
5 LAWRENCE J. FAULK, Chairman  
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26 DISSENTING OPINION  
27 LAWRENCE J. FAULK  
PCHB NO. 86-215